REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC CIVIL SUIT NO. E026 OF 2021

ASSET RECOVERY AGENCY.....APPLICANT

VERSUS

ACTIVE ELECTRONS AFRICA LTD.....1ST RESPONDENT

FIRSTLING SUPPLIES.....2ND RESPONDENT

AMERTRADE LIMITED.....3RD RESPONDENT

RULING

The 1st and 2nd Respondent's Notice of Motion dated 6th October 2021 which is expressed to be brought under Article 50(1) of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 1 Rule 10 (2) and Order 51 rule 1 of the Civil Procedure Rules seeks the following orders:

> ***"1. Spent.***
>
> ***2. THAT this Honourable Court be pleased to join the National Youth Service (NYS) as an Interested Party in the suit herein;***
>
> ***3. THAT costs of the Application be in the cause."***

1. The application is supported by the grounds on its face and by the affidavit sworn by James Thuita Nderitu, the sole proprietor and/or Director of the 1st and 2nd Respondent companies. The 1st and 2nd Respondents/Applicants claim that the Applicant/Respondent has filed a suit seeking orders of forfeiture of monies belonging to them under the **Proceeds Of Crime and Anti-Money Laundering Act (POCAMLA)** on the grounds that the funds were fraudulently acquired from the intended Interested Party who is the National Youth Service, for fictitiously supplied goods and services that were not rendered. They aver that the assertion that the goods were fictitiously supplied and/or that services were not rendered is an indictment against the National Youth Service. Further that the assertion that no goods were supplied is a fact within the special knowledge of the National Youth Service and that by dint of **Section 112 of the Evidence Act** the burden to prove the existence of such fact lies with the National Youth Service. It is deposed that the National Youth Service can only discharge its burden if it is made a party to the suit failure to which the burden would shift to the 1st and 2nd Respondents/Applicants greatly prejudicing them. It is further deposed that the National Youth Service is a necessary party to the proceedings as its presence would enable this court to effectively and completely adjudicate the issues in controversy between the parties and that the Applicant/Respondent shall not suffer prejudice if the orders are granted.

2. The Applicant/Respondent relies on a replying affidavit sworn on the 18th October 2021 by Corporal Isaac Nakitare, an investigator with the Applicant/Respondent. Corporal Nakitare deposes that this matter is purely between the parties in the suit and there is no justification to enjoin the National Youth Service. He deposes that the issue of supply of the goods was a fact within the knowledge of the 1st and 2nd Respondents/Applicants and that the Applicant/Respondent in its application dated 13th August 2021 had extensively explained the manner in which the case was investigated and how the 1st and 2nd Respondents /Applicants acquired the funds in issue. He further deposes that the only question before the court is whether the funds in issue are proceeds of crime within the provisions of the **Proceeds Of Crime and Anti-Money Laundering Act** and that the burden of proving otherwise lies with the 1st and 2nd Respondents /applicants but not with the National Youth Service.

3. During the hearing of the application, Mr. Okubasu, learned Counsel for the 1st and 2nd Respondents/Applicants, reiterated the averments in the affidavit in support of the application. He asserted that the Applicant/Respondent seeks the forfeiture of Ksh. 3,648,158 and Ksh.

718,024 from the 1st and 2nd Respondent/Applicants respectively on the basis that the money was fraudulently acquired from the National Youth Service. Counsel urged that it was only fair that the National Youth Service be enjoined to the suit as its presence will help effectively determine the fact in issue and because this court may make an adverse finding against it.

4. Mr. Adow learned Counsel for the Applicant/Respondent begun by telling this court that the National Youth Service had instructed him to oppose the application. Counsel reiterated the averment in the replying affidavit that there is no cause of action against the National Youth Service as the issue in contention is between the Asset Recovery Agency/Respondent and the 1st and 2nd Respondents/Applicants. He argued that the burden of proof in this case lies with the 1st and 2nd Respondents/Applicants as they are the ones who know the goods they supplied. Counsel stated that the Agency is not seeking any adverse orders against the National Youth Service and that the court could effectively adjudicate all the questions in this case without the National Youth Service being enjoined to the suit. Counsel further stated that the burden of proving that the funds are not proceeds of crime lies with the 1st and 2nd Respondents/Applicants and not on the National Youth Service.

5. In a brief rejoinder, Mr. Okubasu stated that Mr. Adow could not represent the Applicant/Respondent as he was from a different agency. Counsel reiterated that the National Youth Service having been flagged for making fraudulent payments, it would be best that the National Youth Service attends so that it can respond to the allegations made against it.

6. **The issue for determination in this application is whether the National Youth Service is a necessary party in this case and whether the application to enjoin it to the case is merited.**

7. The application is brought under Order 1 Rule 10 (2) of the Civil Procedure Rules which provides that:-

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or <u>whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added</u>."** (Emphasis added)

8. The Black's Law Dictionary, 9th Edition defines a "Necessary Party" as being:-

> ***"A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"***

There is a long line of cases on this issue and on what ought to be considered before a party can be joined in a suit. In the case of ***Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR*** the Supreme Court stated:-

> ***"[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemu case where the Court (at paragraphs 14 and 18) held:***
>
> ***"[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"***
>
> ***[23] Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:***
>
> ***"(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;***
>
> ***(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;***
>
> ***(iii) joinder to prevent a likely course of proliferated litigation."***

In the case of **JMK v MWM & another [2015] eKLR** the Court of Appeal stated:-

> ***"Order 1 Rule (10) (2)* of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or *suo motu*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of *Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887),* state that:**
>
> ***"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."***

In **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** Mativo J

discussing the elements to be considered in joining a party to a suit stated:

> ***"It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit... An interested party may also be added to the case by the court itself, where it appears to the court that it is desirable to do so to resolve a dispute or an issue."***

The court in **Elisheba Muthoni Mbae v Nicholas Karani Gichohi & 2 Others [2013] eKLR** held that

> ***6. ....Is the Applicant, therefore, an essential and necessary party to the suit and should he be added as a plaintiff in this suit in which the Plaintiff seeks to have the suit premises transferred into her name? In the case of Werrot & Co. Ltd & Others v Andrew Douglas Gregory & Others Nairobi (Milimani) H.C.C.C No. 2363 of 1998 (UR), Ringera, J (as he was then) observed that;***
>
> ***"The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. As stated in SARKAR'S LAW OF CIVIL PROCEDURE, Vol. I at pages 531 and 532 there are two tests in the application of this principle:-***
>
> ***1. There must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings in question.***
>
> ***2. It should not be possible to pass an effective decree in the absence of such a party."***

7. In determining who is a necessary party to a suit, Devlin, J in Amon v Raphael Tuck & Sons Ltd (1956) 1 All E. R. 273 in which it was held at p. 286-287 that:

> ***"What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately …the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."*** (Emphasis added).

9. Applying the above principles to this case it is important to first note that the National Youth Service has not itself sought to be enjoined to the suit. It is the 1st and 2nd Respondents/Applicants who have made the application and therefore the burden to prove the necessity of the intended Interest Party to the suit lies with them. The argument put forth by the 1st and 2nd Respondents/Applicants is that the National Youth Service has special knowledge on whether the goods and services were supplied or rendered and the National Youth Service was therefore in the best position to prove the existence of such fact which would assist the court to determine the matter effectively and completely. They also argue that failure to enjoin the National Youth Service to the suit would shift the burden of proof to them hence greatly prejudicing them. In other words the Applicants are saying that the National Youth Service is the carrier of the evidence required in this case.

10. Based on the above precedents, the test in this application is whether the court can effectively and completely adjudicate the issues in controversy between the parties in the absence of the proposed Interested Party. My answer to this question is that it can. The suit against the 1st and 2nd Respondents/Applicants is for the forfeiture of funds reasonably believed to be proceeds of crime but is not against the National Youth Service. The plaintiff is acting in the interest of National Youth Service which is a public body and it does not have a cause of action against it. The law as it stands is that the onus lies upon the respondents to show how they came into possession of the monies paid to them by the National Youth Service. This was as was held in the case of **Assets Recovery Agency v Samuel Wachenje & 7 others [2020] eKLR** where citing with approval the case of **Assets Recovery Agency vs Rohan Anthony Fisher, and & Others, Supreme Court of Jamaica, Claim No 2007 HCV003259** the court held:-

> ***"…Even though these proceedings are quasi criminal in nature there is an evidential burden of proof on the defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized.*** (Emphasis added).

11. The 1st and 2nd Respondents/Applicants will have an opportunity to tender evidence on whether or not they supplied goods to the National Youth Service and indeed they have filed a replying affidavit opposing the forfeiture proceedings and so that issue will go to trial. During the hearing the 1st and 2nd Respondents/Applicants shall be at liberty to prove the facts in issue and do not require National Youth Service to prove the same for them and if they so require they shall be at liberty to call witnesses from thereat. My so finding finds support in the case of **Ethics & Anti-Corruption Commission v Jared Peter Odoyo Oluoch Kwanga & 22 others [2019] eKLR** where the court stated:-

> ***"The suit herein revolves around firstly, unexplained wealth owned by the defendants which is a personal issue and that the County Government has nothing to do with them. Secondly, that the properties in question are products of fictitious contracts by the County Government of Migori. These are matters of evidence in which the defendants/applicants will have an opportunity to prove the existence of legal contracts and the legitimacy of their sources of income in acquiring the impugned properties. They do not need the County Government of Migori to prove that fact on their behalf. If they need them, they will be at liberty to call***

any official from the County Government to testify on their side to vindicate their assertion that the impugned contracts were indeed legal."

Moreover as was observed by Ringera J in the case of **Werrot & Co. Ltd and others V Andrew Douglas Gregory & others (supra) "that a person has relevant evidence to give on some of the questions would only make him a necessary witness."** Similarly I find that in this case the National Youth Service would be but a necessary witness in the case as opposed to a necessary party.

12. Accordingly I find that the 1st and 2nd Respondents/Applicants have not proved that the National Youth Service is a necessary party to the suit and have further not proved that they will suffer any prejudice should this court refuse to grant the orders sought. Their application has no merit. The same is dismissed with costs to the Plaintiff/Respondent. It is so ordered.

SIGNED DATED AND DELIVERED ELECTRONICALLY THIS 18TH DAY NOVEMBER, 2021

E. N. MAINA

JUDGE